United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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74-1811

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1811

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DENNIS D'AMATO,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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DENNIS D'AMATO,

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DEFENDANT-APPELLANT'S BRIEF.

Preliminary Statement

The Appellant, DENNIS D'AMATO, appeals from a Judgment of Conviction in the United States District Court for the Southern District of New York, adjudging him guilty of one count of violating Title 18, United States Code, Section 1001. As a result of this conviction, the Appellant was sentenced to the custody of the Attorney General for imprisonment for a period of sixty (60) days.

However, execution of the prison sentence was suspended and the Appellant was placed on probation for a period of eighteen (18) months.

The Indictment appears on p. 3 of the Appellant's Appendix.

STATEMENT OF THE FACTS

THE INDICTMENT.

The Appellant, DENNIS D'AMATO, was named, along with a co-defendant, ROBERT DONOVAN, in a three-count Indictment charging both defendants with two counts of mail fraud and the Appellant alone with one count of making a false statement in violation of Title 18, United States Code, Section 1001.[1] After trial before the Court and a jury, D'AMATO was acquitted on both mail fraud counts and convicted of the false statement count.[2]

THE GOVERNMENT'S CASE.

In support of the Indictment, the Government alleged that Robert Donovan, using the name of George Zimmer and doing business as Zimmer & Associates, participated in a scheme to counterfeit and distribute "Ultra Sheen", a cosmetic hair dressing. The proof demonstrated

[1]The false statement count was added to a superseding Indictment filed two weeks prior to trial.

[2]The co-defendant, ROBERT DONOVAN, was convicted on both counts one and two.

that D'AMATO, a wholesale distributor of health and cosmetic sundries, sold the product which was later determined to be counterfeit.

As noted above, D'AMATO was acquitted of the two counts charging participation in the fraudulent scheme. However, for an effective analysis of the false statement count, it is necessary to present the facts which established that scheme.

Tracing the Government's chain of proof in reverse order, it could be found that Ultra Sheen sold by the Appellant D'AMATO was counterfeit. (A 116, 163, 175, 184, 195, 187).* The spurious product was contained in jars similar to those used by the legitimate manufacturer of the item. Circumstantially, it was shown that Donovan, as Zimmer & Associates, purchased large quantities of emply jars from Carr-Lowery Glass Co. (A 53 - 60), and the appropriate caps from the Sterling Seal Co. (A 39 - 43)

James Chavis, an employee of the Ideal Decorating Company (T 89), testified that in March of 1972 he silk-screened jars with the label of Ultra Sheen hair

*The letter "A" refers to Appellant's Appendix while transcript references are introduced by the letter "T".

conditioner. (A 104) The business records of Chavis' employer indicated that the job was invoiced to Zimmer & Associates at a fictitious address. (A 108) It had earlier been alleged through the testimony of a truck driver for the Atkinson Freight Company that the delivery of the Carr-Lowery jars had been directed to the Ideal Decorating Company at the request of Robert Donovan. (A 73 - 76)

The "connection" between the Appellant, D'AMATO, and the activity of Zimmer & Associates, surfaced in the testimony of the Appellant's brother, Robert D'Amato. The Government established that Robert D'Amato had picked up a delivery of the jar caps used on the counterfeit product which had been consigned to Zimmer & Associates. (A 138 - 141, 146) The witness D'Amato testified that this was done at the direction of his employer-uncle, Joe Vetree, who was also in the wholesale drug business. (A 157 - 158)

On another occasion, when the Appellant was ill and could not make his business deliveries, Robert D'Amato was asked to deliver a quantity of Ultra Sheen to Jano Distributors, a customer on Long Island. (A 148 - 149)

The false statement count focused on an affidavit filed by the Appellant, D'AMATO, in the United States District Court for the Eastern District of New York in a civil action brought by Johnson Products Company, the manufacturer of Ultra Sheen, against DENNIS D'AMATO and others. (A 188 - 189)[3-4]

QUESTIONS PRESENTED

1. Whether venue was proper in the Southern District of New York when the allegedly false affidavit was executed and filed in the United States District Court for the Eastern District of New York?

2. Whether the evidence, considered in the light most favorable to the Government, was sufficient to sustain Appellant's conviction for violating Title 18, United States Code, Section 1001.

3. Whether materiality is an essential element of Title 18, United States Code, Section 1001.

[3]Johnson Products Co.,Inc.,Plaintiff v Brodt & Co.,Inc., Dennis D'Amato, et al., Defendants, E.D.N.Y., Civ. No. 72 C 1009.

[4]The affidavit appears in the Appellant's Appendix at p. 7.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI--JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

STATUTES INVOLVED

Title 18, United States Code, Section 1001 reads as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

POINT I

VENUE FOR COUNT THREE OF THE INDICTMENT WAS SOLELY IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK; THE SOUTHERN DISTRICT CONVICTION, THEREFORE, SHOULD BE REVERSED.

Prior to trial on the superseding Indictment, which charged the Appellant, D'AMATO, with a Section 1001 violation, counsel unsuccessfully moved for dismissal of that count on the ground of improper venue. In relevant part, the count charged that:

> "On or about the 8th day of August, 1972, in the Southern District of New York, Dennis D'Amato, the defendant, in a matter within the jurisdiction of the department of the United States, to wit: the United States DistrictCourt for the Eastern District of New York, unlawfully, wilfully and knowingly made and caused to be made false, fictitious and fraudulent statements in an 'affidavit'..."

At trial, the physical events surrounding the filing of the affidavit in the Eastern District were stipulated to as follows:

> "Ladies and gentlemen, it is stipulated that the facts set forth in the affidavit, government's exhibit 23, were recited by Dennis D'Amato to his attorney in that civil case, to Sylvia Garland, in her office in Manhattan, and that the affidavit was then prepared in her office in Manhattan, and

that the affidavit was signed by Mr. D'Amato in Brooklyn." (A 223)

It had earlier been stipulated, of course, that the affidavit had been filed in the United States District Court for the Eastern District of New York. (A 188 - 189)

After the Government had rested, counsel again moved to dismiss count three on the grounds that venue was improper. (A 249) Indeed, a post-verdict Motion pursuant to Rule 29 of the Federal Rules of Criminal Procedure, brought on behalf of the Appellant, once again asserted that the prosecution could only have been brought in the Eastern District of New York.

In the Court below, as here, the Appellant primarily relies on the United States Supreme Court's decision in TRAVIS v. UNITED STATES, 364 U.S. 631 (1961). Initially, TRAVIS re-affirmed the proposition that questions of venue are of Constitutional dimension under the provision of the Sixth Amendment. Recently, in UNITED STATES v. CANDELLA, 487 F. 2d 1223 (2nd Cir., 1973), this Court stated that:

> "While the question of whether the trial is conducted almost literally at one end of the Brooklyn Bridge or the other might seem to be a quibble, questions of venue

in criminal cases are of constitutional concern." 487 F. 2d at p. 1227

On the question of whether venue was proper in the Southern District of New York TRAVIS, it is submitted, is directly on point and demonstrates that the instant case must be reversed. TRAVIS, as the case at bar, was a prosecution under Title 18, United States Code, Section 1001. The false statement there involved allegedly appeared on an affidavit under the then effective Section 9(h) of the National Labor Relations Act. These affidavits were prepared and executed in the State of Colorado and filed in Washington, D.C. with the National Labor Relations Board. Rejecting the theory advanced by the Government that the mailing had constituted a continuing offense under Title 18, United States Code, Section 3237(a), the Court reasoned that no offense had begun until the filing had been completed in the District of Columbia.[5]

In the Court below, the Government attempted to distinguish TRAVIS by advancing the argument that TRAVIS is limited to its own peculiar set of facts. In support

[5]The Government in the instant case similarly relied on Section 3237(a).

of this position, the Government placed great reliance on two recent cases decided in this Circuit. UNITED STATES v. CANDELLA (SUPRA); UNITED STATES v. SLUTSKY, 487 F. 2d 832 (2nd Cir., 1973). In fact, specific reference was made to a footnote appearing in the SLUTSKY decision which distinguished TRAVIS from the venue question there presented. In SLUTSKY, this Court held that an alleged violation of Title 26, United States Code, Section 7206(1), prosecution can be brought in a district where the false statement is prepared and signed even though the return is received and filed elsewhere under the provision of Title 18, United States Code, Section 3237(a). In reaching this decision, the Court noted that:

> "Travis v. United States, 364 U.S. 631 (1961), is not to the contrary. While that case held that the alleged violation of 18 U.S.C.,Section 1001 (making false statement) could be prosecuted only in the districts in which the affidavits had been filed, the decision surely was meant to be confined to the facts based on the unusual statute involved." 487 F. 2d at p. 839, footnote 8.

The Government, in an attempt to by-pass TRAVIS, seemingly urges that the "unusual statute involved" is not Section 1001 but rather Section 9(h) of the National Labor Relations Act. Cases decided in this Circuit, which will be discussed below, clearly belie this assertion.

However, if one were to accept the Government's apparent interpretation of the SLUTSKY panel's view of TRAVIS, that analysis would lend even more credence to the Appellant's position herein. Plainly stated, the Supreme Court in TRAVIS noted that Section 9(h) did not require the Union officers to file "non-communist" affidavits. The Court then stated that:

> "If it had, the whole process of filing, including the use of the mails, might logically be construed to constitute the offense." 364 U.S. at p. 365.

The Court then reasoned that the actual filing, which was not required, might have never taken place. Similarly, in the instant case, there was no requirement that the affidavit in question be filed. In a civil proceeding, there were many options available to the Appellant, including his right to exercise his Constitutional privilege against self-incrimination. There was, therefore, as in TRAVIS, no offense unless and until the affidavit had been filed in the District Court for the Eastern District. Appellant herein submits that such a narrow interpretation of TRAVIS is wholly unwarranted, but even on such a limited application, the case is controlling. Succinctly stated, in a 1001 prosecution, venue lies only where the false statement is filed.

The Government's reliance below on UNITED STATES v. CANDELLA (SUPRA), is similarly misplaced. In CANDELLA, affidavits and attendant documents were "simply accepted...in Brooklyn for the convenience of parties... and were then conveyed to the central office in Manhattan for examination and payment." In other words, the alleged false statements were filed in the Southern District where the prosecution was brought. In the case at bar, the allegedly false affidavit was executed, submitted and filed in the Eastern District. There and only there could the prosecution have been brought.

In a converse situation, Appellant's position is directly supported by this Court's decision in UNITED STATES v. BITHONEY, 472 F. 2d 16 (2nd Cir., 1973). In BITHONEY, the issue concerned a false statement violation under Title 18, United States Code, Section 1015(d). Before noting the similarity between Section 1015 and Section 1001, the Court reasoned that:

> "To hold that the mere writing of a false acknowledgment which is immediately destroyed and never filed, presented or in any way used to obtain relief in any court or administrative agency, seems to us to be a result that was never contemplated by the Congress when this statute was enacted."

In the instant case, this logic is even more compelling.

D'AMATO executed the allegedly false affidavit in the Eastern District. Only the raw preparation was accomplished in the Southern District. Prior to execution, D'AMATO simply could have rejected the affidavit and it would then never have been submitted to any "department or agency of the United States".

In BITHONEY, the Court's analysis of Section 1015(d), direct comparison was made to Section 1001. That comparison, again, supports Appellant's position herein:

> "Thus, for example, the petitioner in Travis v. United States (citations omitted) did not violate 18 U.S.C., §1001 when he 'knowingly and willfully falsifie(d)' an affidavit until he filed the affidavit, for only at that point was the remainder of the statutory provision, 'in any matter within the jurisdiction of any department or agency of the United States,' satisfied."

In the face of this authority, the Government clings to the proposition that the fact that D'AMATO gave a factual basis for the affidavit to his attorney in her Manhattan office provides venue in the Southern District. It is now clear that mere preparations, "even essential ones", do not afford venue. UNITED STATES v. SWEIG, 316 F. Supp. 1148, 1160 (S.D.N.Y.,1970); UNITED STATES v. WALDON, 464 F. 2d 1015 (4th Cir., 19720). It is respectfully submitted, therefore, that the Trial Court erred

in denying counsel's Motion for dismissal of Count three on the ground that venue did not properly lie in the Southern District.

For these reasons, therefore, reversal should be ordered.

POINT II

THE EVIDENCE TAKEN IN THE LIGHT MOST FAVORABLE TO THE GOVERNMENT WAS INSUFFICIENT TO SUPPORT APPELLANT'S CONVICTION UNDER COUNT THREE OF THE INDICTMENT.

The Appellant, DENNIS D'AMATO, contends that the evidence, considered in the light most favorable to the Government, UNITED STATES v. FREEMAN, --- F. 2d --- (2nd Cir., June 7th, 1974), is insufficient to support his conviction for violating Title 18, United States Code, Section 1001.

The theory of the Government's case on this count is that the Appellant falsely identified the source of the counterfeit Ultra Sheen which he distributed and the circumstances surrounding that purchase. Additionally, the Government alleged that D'AMATO had falsely stated the amount of Ultra Sheen that he had sold. (A 246 - 247) Appellant submits, however, that the Government failed to present evidence on which it could be found beyond a rea-

sonable doubt that the facts set forth in the affidavit were actually false. UNITED STATES v. TAYLOR, 464 F. 2d 240 (2nd Cir., 1972).

The first alleged falsity that the Government relies on is contained in the following portion of the affidavit:

> "Moreover, I have no way of knowing whether any of the Ultra Sheen product which I had purchased in October of 1971 was manufactured, packaged and distributed by the plaintiff in this action, or by some other company using a false and fraudulent label." (A 8)

The Government's assertion was that the proof had shown that the counterfeit Ultra Sheen in issue had not been assembled until it was silk-screened by the Ideal Decorating Company in March of 1972. (A 104) According to the Government, then, it was impossible for D'AMATO to have purchased the Ultra Sheen in October of 1971. This inference of falsity suggested by the Government overlooks some rather essential evidence.

Most significantly, when James Chavis of the Ideal Decorating Company, was called on the defense case, he testified that the silk-screen which affixed the Ultra Sheen label to the jars purchased by Zimmer & Associates, was made in 1971. (A 256) Philip Patton, of the Sterling

Seal Company, testified that his company manufactured the caps on the jars in issue and that these caps had been sold to "Zimmer Associates". Patton also testified that the caps he sold were also sold to Johnson Products, the legitimate manufacturer, (A 40) and further, that any customer could buy the product. (A 46) Edward N. Hussey, of the Carr-Lowery Glass Company, testified that he supplied jars to Zimmer & Associates in February of 1972 and that Carr-Lowery jars ultimately housed the counterfeit product. However, cross-examination of Hussey revealed that Carr-Lowery manufactures millions of jars (A 68) and that the jars in issue were ordinary stock jars. (A 70) Edward Noel, also of Carr-Lowery (A 207), testified that the jar in issue was a stock jar capable of being sold to anyone. (A 214)

This testimony makes it evident that the generic products were available to anyone at anytime thereby failing to eliminate the possibility that the counterfeit, which the defendant sold, had been manufactured earlier in 1971 and that, indeed, the defendant made his purchase in October of 1971.

Regarding the alleged false statement, the Government also relies upon the fact that the Appellant

purchased the items from an individual who supplied a receipt bearing the name of Balzac Trading Company at 348 East 27th Street, New York, New York. By stipulation, it was established that there was no such address. (A 219) What the Government fails to recognize, however, is that D'AMATO never asserted in the affidavit that he personally obtained the Ultra Sheen from this address or had any contact whatsoever with Balzac Trading Company. It had been clearly established at trial that Zimmer & Associates had continually been employing fictitious names and addresses. (A 108) Before concluding its case, the Government called one George Zimmer, whose name was allegedly borrowed by the defendant, Donovan. (A 224ff)

That the Appellant, D'AMATO, was never sufficiently connected to the "Zimmer" operation is reflected in the jury's verdict. The thread upon which the Government relies is the testimony of the Appellant's brother Robert D'Amato, who had played a ministerial function with regard to the counterfeit product. Although the Government never demonstrated any criminal intent on the part of Robert D'Amato, they singularly depend on this event to prove that DENNIS D'AMATO had knowingly made a false statement.

The allegation that the affidavit is false,

therefore, is, at best, speculative. The Government failed to prove that the Appellant had participated in the fraudulent scheme. Little more was established than that the Appellant could have obtained the product from Zimmer. That the Appellant possibly submitted a false affidavit, certainly did not sustain the Government's burden of proving guilt beyond a reasonable doubt. As stated by this Court,

> "False representations, like common-law perjury, require proof of actual falsity ..." U.S. v. Diogo, 320 F. 2d 898 (2nd Cir., 1963).

In the instant case, it is submitted, the Government has completely failed to prove an actual falsity. It is clearly established that suspicious circumstances are an insufficient quantum of proof to sustain a criminal conviction. UNITED STATES v. GLANTZMAN, 447 F. 2d 199 (3rd Cir., 1971).

The last element of the affidavit which the Government contends has been proven false is that part which alleges that D'AMATO had made a total purchase of 1,130 cases from the salesman he had met. The Government, on the other hand, alleged that a "mistake" had been made and that fifteen or sixteen hundred cases had been sold.

(A 46) This variance, it is respectfully submitted, hardly supports the essential element of wilfullness required under the statute.

POINT III

THE TRIAL COURT'S FAILURE TO CHARGE MATERIALITY AS AN ESSENTIAL ELEMENT OF THE OFFENSE WAS REVERSIBLE ERROR.

Trial Counsel, in his summation to the jury, argued that the Government had failed to prove that the affidavit in question was false in any material respect. (T 271 - 272) The Court, in its charge to the jury, failed to specify as one of the essential elements of proving a Section 1001 violation that the false statement must be as to a material fact. An exception was taken and a request was made in this regard. (A 297 - 298)

Appellant herein does not overlook the fact that this Circuit has consistently rejected the proposition that materiality is an essential element in this type of a Section 1001 violation. UNITED STATES v. MARCHISIO, 344 F. 2d 653 (2nd Cir., 1965); UNITED STATES v. AADAL, 368 F. 2d 962 (2nd Cir., 1966) and cases cited within.

It is equally clear that the weight of authority has interpreted Section 1001 as requiring a material falsification. UNITED STATES v. RATNER, 464 F. 2d 101 (9th Cir.,

1972); UNITED STATES v. EAST, 416 F. 2d 351 (9th Cir., 1969); FREIDUS v. UNITED STATES, 223 F. 2d 598 (D.C. Cir., 1955); UNITED STATES v. LA ROCCA, 245 F. 2d 196 (3rd Cir., 1957); GONZALES v. UNITED STATES, 286 F. 2d 118 (10th Cir., 1960); BRETHAUER v. UNITED STATES, 333 F. 2d 302 (8th Cir., 1964).

Appellant herein respectfully requests this Court to re-examine its interpretation of the elements required to be proven by Section 1001.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the conviction herein should be reversed and the Indictment dismissed or, in the alternative, that the case be remanded for a new trial.

Respectfully submitted

GERALD L. SHARGEL
Attorney for Defendant-Appellant

LA ROSSA, SHARGEL & FISCHETTI
Of Counsel

Service of three (3) copies of the within
is hereby admitted
this day of

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Attorney(s) for